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In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,
v.
SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,
v.
NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals
For The First Circuit

BRIEF FOR THE MASSACHUSETTS ASSOCIATION OF 766 APPROVED PRIVATE SCHOOLS, INC., AMICUS CURIAE

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Statement of Amicus Curiae

This brief urging affirmance of the judgment of the United States Court of Appeals for the First Circuit, *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), is filed by the Massachusetts Association of 766 Approved Private Schools, Inc. ("the Association"), *amicus curiae*, with the consent of all parties.

This case calls into question, on a novel theory of state action, the right of independent and autonomous private schools to control their own educational policies. The Court of Appeals for the First Circuit rejected the petitioners' state action claims. The Association urges affirmance of the First Circuit decision to preserve the traditional independence and autonomy of its member schools and to preserve the full range of educational alternatives necessary to meet the particular needs of severely handicapped children.

The Association is a non-profit corporation chartered under Chapter 180 of the Massachusetts General Laws. The members are private elementary and secondary schools dedicated to providing educational programs and services to handicapped children, and particularly to children with severe and complex handicaps and handicaps of low incidence. More than one hundred special needs schools and treatment centers are members of the Association. Appendix A.

Members include historic innovators in the field of special education in the United States: The Perkins School for the Blind (established 1829), The New England Home for Little Wanderers (established 1865), The Boston School for the Deaf (established 1899), The Clarke School for the Deaf (established 1867), The Cotting School for Handicapped Children (established 1893). Appendix A. Other member schools have been more recently established by parents of children with special needs. New Perspectives School, Inc., a defendant in this action, is a member of the Association. Because state authorities are permitted to refer handicapped children to schools outside the Commonwealth, members of the Association have included private schools in Vermont, New York, New Hampshire, Rhode Island and Connecticut.

The Association's members are all private schools in the ordinary sense of the term. They are individually incorporated and administered by independent boards; they operate on private property; they each control their own admissions and hiring

policies; they each define and control their separate and independent educational philosophies, programs and goals. Most member schools are highly specialized and treat children with a particular range of disabilities. *See* Appendix B. Most are identified with, and implement in their programs, a particular philosophical or pedagogical approach to the difficult educational responsibilities they have assumed.

Each of the Association's member schools has been approved by the state Department of Education as a private school to which Massachusetts children requiring special education may be referred pursuant to 1972 Mass. Acts c. 766, Mass. Gen. Laws Ann. c. 71B (West Supp. 1981) ("Chapter 766").[1] All member schools accept publicly funded scholarship students referred by state and local authorities pursuant to that statute. The population of certain member schools is comprised almost exclusively of publicly funded students. The population of others is more evenly divided between children referred and paid for by the state and children referred and paid for by their parents or guardians. Some schools have a preponderance of privately funded students. Because some member schools are privately endowed or receive charitable contributions, the cost of educating even publicly funded children is not necessarily paid for entirely by the state. Some schools underwrite a portion of the cost of educating publicly funded children with their endowment funds. *See, e.g., Perkins School for the Blind* v. *Rate Setting Commission*, Mass. App. Ct. Adv. Sh. (1980), 1947, 1948-49, 411 N.E.2d 1317, 1319, *remanded* Mass. Adv. Sh. (1981) 1510, 423 N.E.2d 765.

Most Association members were established before enactment of Chapter 766. Appendix A. Historically, the Massachusetts legislature has authorized state agencies to send certain categories of handicapped children to private schools and to pay for their care and education with public funds, and various member schools have accepted publicly funded scholarship children since

[1] There are approximately fifty Chapter 766 approved schools which are not members of the Association.

the middle of the last century. The primary impact of Chapter 766 on the private schools is that it enables them to make their services available to a greater number of children, independent of charity or ability to pay.

Summary of Argument

The action of a private, independent school for handicapped children is not state action and does not become state action when it accepts publicly funded scholarship students pursuant to Chapter 766. The education of handicapped children is not a function traditionally exclusively reserved to the state.

Traditionally, the education of handicapped children has been primarily a function of private schools. In Massachusetts, even state funded education of handicapped children has been traditionally a function of private institutions. In those limited instances in which the legislature has provided for special classes for handicapped children in the public schools, special education has been a parallel function of the private schools.

For very good reasons, Chapter 766 has not altered the traditional role of private schools in providing special education to handicapped children in Massachusetts. Private schools are uniquely situated to provide for the range of needs of seriously handicapped children and children with handicaps of low incidence. Thus, the school committees are required, under Chapter 766, to "provide or arrange for the provision of" the special education programs required by statute. The statute explicitly authorizes them to refer handicapped children to private schools and enter into purchase of service contracts to pay the cost of their education and support. Special education in Massachusetts under Chapter 766 is a dual and parallel function of public and private institutions.

Private schools providing special education to handicapped children under Chapter 766 are private institutions in the ordinary meaning of that term. The statute does not impair the traditional independence of the private schools in the management of their internal affairs. In particular, the statute and the regulations preserve intact the associational freedoms inherent in the schools' constitutionally protected status as private institutions.

Nor does the fact that these private schools receive public funding for certain of their students impair their private status. Under Massachusetts law, private schools receiving public funds for special education are private schools standing in a contractual relationship to the state. And this Court's cases have made clear that public funding, even public funding accompanied by a regulatory scheme, does not impair the private status of private institutions. An expansion of the public function doctrine to include private schools providing publicly funded special education would call into question the private status of a vast array of private entities which provide services under contracts authorized by public entitlement programs.

This Court should not abandon carefully confined public function doctrine and deem the action of the schools state action in the absence of tradition and exclusivity. Such a suggestion was rejected in *Flagg Bros.* and should not be adopted here. The exclusivity requirement provides an operational basis of decision that is necessary where public and private functions are parallel and intermingled and particularly necessary where, as here, private schools may provide special education to a mix of privately funded and publicly funded students.

Furthermore, the action of private special education schools can not be deemed state action because private schools have not been delegated a function the state is obligated to perform. Chapter 766 does not obligate the state to provide special education within its own institutions. As stated, the statute explicitly authorizes the state to discharge the obligation to "provide or arrange for the provision of" special education through contractual arrangements with private institutions. There is no allegation that the state has delegated any function that the statute obligates it to perform: to identify children with special needs, to propose an education plan, to refer a child to an appropriate school, and to pay for the education and support if provided by a private school. On the contrary, the case is predicated on the state having performed all of these functions. The concept of a "delegated function" is inapplicable to this case.

The petitioners' suggestion that the court abandon all traditional tests of state action should be summarily rejected. The balancing test proposed by the petitioners is not a test of state action at all, but a determination of the merits of a lawsuit *assuming* the existence of state action. The proposed test avoids decision of precisely the issue at hand, whether the action of a private school is state action subject to the constraints of the Fourteenth Amendment.

In any event, were the Court to adopt a balancing test in this case, the interest of preserving maximum opportunity for individual choice far outweighs the claims of the plaintiffs. Because different children thrive and succeed in different educational settings, and because of the range of disabilities the schools are called upon to meet, a wide range of autonomous and independent educational alternatives for handicapped children is essential to the success of the statutory scheme.

Argument

I. The Fourteenth Amendment Is Inapplicable to a Private, Independent School Providing Special Education for Handicapped Children Because the Action of the School Is Not State Action.

A. *The Action of a Private, Independent School Providing Special Education for Handicapped Children Is Not State Action Under the Public Function Doctrine.*

1. *The Action of a Private School Providing Special Education Is Not State Action Because Special Education Is Not a Function Traditionally Exclusively Reserved to the State.*

The petitioners, all former teachers in a private secondary school providing special education for handicapped children,

have brought suit under the Fourteenth Amendment to the Constitution of the United States challenging the authority of the school to further its independent educational policies by dismissing members of its faculty. As the petitioners concede, the decision of the First Circuit dismissing this suit can be overturned only if the action of the school is deemed to be state action. Petitioners' Brief ("Br."), at 13. The restraints of the Fourteenth Amendment are applicable only "against State laws and acts done under State authority"; the amendment "erects no shield" against private conduct. *Civil Rights Cases*, 109 U.S. 3, 13 (1883); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). Unless the actions of this private school are held to be the actions of the state, the state action requirement of the Fourteenth Amendment protects the defendants' rights of privacy and free association and their right to pursue independent educational policies free from interference by the state.

The petitioners press their Fourteenth Amendment claims against the school solely under a public function theory of State action.[2] In order for the action of an independent, private school to be deemed the action of the state under the public function doctrine, the state must have delegated to the school a function "traditionally exclusively reserved to the State." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Special education in Massachusetts, like education generally, is not now nor has it ever been a function exclusively reserved to the state. Private, independent schools in the Commonwealth historically have provided special education for handicapped children from Massachusetts and elsewhere who, as a general rule, would not otherwise have received any appropriate

[2] As the petitioners do not challenge the decision of the First Circuit Court of Appeals, *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), on any other grounds, the Association will not address any other theory of state action in this brief. However, the Association urges affirmance of the decision of the First Circuit on all grounds. The petitioners have not, on any theory, met their threshold burden of establishing that the action of the school was state action under the Fourteenth Amendment. *Cf. Polk County* v. *Dodson*, 50 U.S.L.W. 4077 (December 14, 1981).

education. The fact that these private schools may accept publicly funded scholarship children referred to by state agencies under purchase of service contracts does not convert these private institutions into an arm of the state.

Traditionally, the education of handicapped children in Massachusetts has never been the exclusive function of the public schools. On the contrary, handicapped children have generally been exempted from compulsory education laws,[3] and have been routinely excluded from public schools. *Rendell-Baker* v. *Kohn*, 641 F.2d 14, 26 (1st Cir. 1981). *See also Pennsylvania Association of Retarded Children* v. *Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills* v. *District of Columbia Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). Such public education of handicapped children as has existed in Massachusetts has been narrowly circumscribed and authorized only pursuant to statutes, many of recent origin, which provided for special education of children with particular and limited categories of handicaps and in limited educational settings.[4] By way of example,

[3] 1939 Mass. Acts c. 461, as amended, Mass. Gen. Laws Ann. c. 76, §1. Prior to the enactment of Chapter 766, the Massachusetts compulsory education law exempted from required attendance in school "a child whose physical or mental condition is such as to render attendance inexpedient or impracticable. . . ." 1972 Mass. Acts c. 766, §12 subjected this exclusion to the provisions of Mass. Gen. Laws Ann. c.71B, §3. Similar exemptions from compulsory attendance laws historically have existed throughout the states. *See* Kotin, L. & Aikman, William L., *Legal Foundations of Compulsory School Attendance*, National University Publications, Kennekat Press, Ft. Washington, N.Y. & London, 1980

[4] In 1919, the several school committees were directed to provide special classes for mentally retarded children in every town where there were ten or more mentally retarded children. (1919 Mass. Acts c. 277). The threshold number of mentally retarded children requiring the provision of special classes was reduced to five in 1954. (1954 Mass. Acts c. 514, §5). Special classes for deaf children were required in 1923 (1923 Mass. Acts c. 361), limited, until 1952, to six towns in the Commonwealth (1952 Mass. Acts c. 498) and until 1957, were not required in cities and regional school districts (1957 Mass. Acts c. 615). Special classes for crippled children were provided in 1930 (1930 Mass. Acts c. 368), were authorized, but not required, for hearing defective children in 1938 (1938 Mass. Acts c. 313), were provided for emotionally disturbed children (if there were five or more such children) in 1960 (1960 Mass. Acts c. 750), were authorized, but not required, for learning impaired children in 1966 (1966 Mass. Acts c. 647, §1) and for speech impaired children in 1967 (1967 Mass. Acts c. 761).

there was no public special education for physically handicapped children in Massachusetts until 1930, for emotionally handicapped children until 1960, or for learning impaired children until 1966.[5] Prior to each of these enactments, and for children whose handicaps did not fall within the categories recognized from time to time by statute, and where public special education was authorized but not provided, the special education of handicapped children was provided, if at all, exclusively in private institutions. Even within the categories of disability for which public education was provided by the legislature, the education of handicapped children continued to be—and was acknowledged by the legislature to be—a parallel function of the private schools.[6]

Not even the education of handicapped children with public funds in Massachusetts has traditionally been the exclusive function of the public schools. Pursuant to statutes enacted from time to time since 1867,[7] the legislature has authorized the use of public funds for the purpose of educating handicapped children in private institutions.[8] The Department of Education, on the

[5] *See* n.4, *supra*.

[6] *See, e.g.*, Mass Gen. Laws Ann. c. 71, former §§46A and 46H (West 1969), limiting the education of physically and emotionally handicapped children to children "not otherwise provided for"; Mass. Gen. Laws Ann. c. 71, former §46B (West 1969), providing for publicly supported transportation for handicapped children attending non-public schools.

[7] 1867 Mass. Acts c. 311, §1 authorized the governor to send deaf mutes or deaf children, at the expense of the Commonwealth, to the Clarke Institution for Deaf-Mutes or to "such other schools as may be established in the Commonwealth."

[8] The Constitution of Massachusetts, while prohibiting public aid to private schools generally, explicitly permits the Commonwealth and its political subdivisions to make payments to private hospitals, infirmaries, or institutions for the deaf, dumb or blind. Art. 18 of the Amendments, as amended by Art. 46 and Art. 103. Notwithstanding repeated efforts to prohibit public funds to flow to private institutions altogether, the Constitutional Convention of 1917 retained a provision permitting the use of state funds for certain specialized education to handicapped children, Art. 46, §3. *See Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. (1981) 502, 508-11, 417 N.E.2d 408, 411-13.

request of a child's parents or guardians and with the approval of the governor, historically has been authorized to send deaf, dumb, blind, and aphasic persons, and persons with multiple handicaps to private schools within or without the Commonwealth and to pay for their education and support, and has been authorized to make tuition payments for children enrolled in specific private schools which are members of the Association: the Clarke School for the Deaf, the Horace Mann School at Boston, the Beverly School for the Deaf, the Boston School for the Deaf, the Perkins School for the Blind. Mass. Gen. Laws Ann. c. 69, former §26 (West 1969).[9]

More recently, the legislature has made public funds available to reimburse the towns or school districts for one half of the cost of educating children who attend clinical nursery schools, day care centers, or other institutions for the care, education, or treatment of retarded children conducted by accredited schools or colleges within the Commonwealth (1954 Mass. Acts c. 514, §3),[10] and has authorized the expenditure of public funds for the education of emotionally disturbed children, learning impaired children, and physically handicapped children in private schools, hospitals, sanitoria, or like institutions within or without the Commonwealth. 1960 Mass. Acts c. 750, §1; 1966 Mass. Acts c. 647; 1968 Mass. Acts c. 695.[11]

The enactment of Chapter 766 has not altered the traditional role of private schools in providing special education to handicapped children in Massachusetts. While Chapter 766 requires a school committee to offer an alternative form of education to every special needs child that has been denied admission or continued attendance in the public schools, such alternative forms of education are not required to be provided in the public schools.[12] On the

[9] Mass. Gen. Laws Ann. c. 69, former §26 (West 1969) was repealed and supplanted by 1972 Mass. Acts c. 766, which contains essentially the same provisions.

[10] Mass. Gen. Laws Ann. c. 69, former §29B (West 1969).

[11] Mass. Gen. Laws Ann. c. 71, former §§46I, L, and M (West 1969).

[12] Chapter 766 requires the school committee to "provide *or arrange for* the provision of" the special education programs required by statute. Mass. Gen. Laws c. 71B, §3 (emphasis added).

contrary, if it is not within the "cost effective capabilities of public education" to provide the full range of required special education programs within their own institutions, the various school committees are expressly authorized, with the consent of the affected parents or guardians, to enter agreements with "any public or private school, agency or institution" to provide the necessary special education within a city, town or school district. Mass. Gen. Laws Ann. c. 71B, §4; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. (1981) 502; 504; 417 N.E.2d 408, 410. In addition, at the request of the affected parents or guardians, and with the approval of the State Department of Education, the school committees may refer children requiring special education "to any institution within or without the commonwealth" and enter into purchase of service contracts with such institutions to pay the cost of education and support actually rendered. Mass. Gen. Laws Ann., c. 71B, §10. *Commonwealth* v. *School Committee of Springfield, supra*, Mass. Adv. Sh. (1981) at 504-06, 511; 417 N.E.2d at 410-11, 417.

The regulations of the Department of Education make it perfectly clear that the school districts are not expected to provide either day school programs or residential school programs within their own institutions. Such regulations provide that the child "be placed in a program at a facility other than a public school regular education facility." 603 CMR 502.5(a), 502.6(a). (A-40, 41). *Compare also* 603 CMR 502.4 ("Each school committee *shall provide*. . . substantially separate" programs for certain handicapped children within the schools) with Sections 502.5 and 502.6 ("Each school committee *shall arrange for the provisions of*" day school programs and residential school programs). (emphasis added) (A-37, 39, 41). Consistent with these regulations, during the school year 1977-1978, 3,958 students were placed in day school programs and 1,569 were placed in residential programs outside the public school system statewide. *Commonwealth* v. *School Committee of Springfield, supra*, at 507, n.8, 417 N.E.2d at 411. As of February 18, 1981, no school system in Massachusetts had developed a residential special education program in the public

schools. *Id.*, n.7. For the grievously and multiply handicapped child in Massachusetts, special education is now, as it has been traditionally, exclusively the function of the private schools.

There are very good reasons for the legislature's decision to preserve access to private special education schools within the parameters of Chapter 766. Private institutions are uniquely situated to provide the range of services contemplated by the legislature in enacting Chapter 766, including the highly specialized education required for children with severe handicaps of low incidence. As the petitioners acknowledge, private institutions historically have been sufficiently free of "orthodoxy and bureaucracy" to develop and apply innovative techniques for the education and training of severely disturbed children.[13] Br. at 40. The private schools are sufficiently varied in size, philosophy, and educational mission to meet the range of needs presented by handicapped children in the Commonwealth. Appendix B; *Commonwealth* v. *School Committee of Springfield*, *supra*, Mass. Adv. Sh. (1981) at 506, 417 N.E.2d at 411.

In addition, the existence of the private schools gives substance to the statutory rights of parents to participate in the educational choices made for their handicapped children and to advocate for their needs. Chapter 766 was enacted pursuant to a legislative finding that "the present inadequacies and inequities in the provision of special education services to children with special needs have resulted largely from a lack of significant parent and lay involvement in overseeing, evaluating and operating special educational programs." 1972 Mass. Acts c. 766, §1. Consistent with this finding, the legislature has provided for significant and substantial parent participation in the choice and design of special education programs for handicapped children. Parents of handicapped children are entitled to obtain, at state expense, an independent evaluation of their child's needs; to challenge, at a hearing, any

[13] Albert E. Trischman, "The Walker School: An Education Based Model," *Child Care Quarterly*, Vol. 5, No. 2; Summer, 1976; Jack R. Gannon, *Deaf Heritage, A Narrative History of Deaf America*, National Association of the Deaf, Silver Spring, Maryland, 1981, pp. xxi-xxxi, 1-58.

evaluation made by the state; to reject the education program suggested by the state; to elect a regular school program for their child; or to select an alternative special education placement in a private school. Mass. Gen. Laws Ann. c. 71B, §3; *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480 (1978), 381 N.E.2d 922. By statute, parents are entitled to appeal to the state Department of Education and to the state courts to obtain a particular placement for their child, and the Department and the courts are empowered to order the school committee to provide the education that the parents have concluded is in their child's best interests. *Id.*

Absent the existence of private and independent schools which offer a range of educational programs for handicapped children, the rights of parents to pursue alternative forms of special education for their children would be without substance, and the legislative intent to provide a sufficiently flexible program to meet the particular needs of handicapped children would be frustrated. The legislature, in enacting Chapter 766 and mindful of the difficulty of the educational task at hand, determined to preserve the traditional role of private institutions in educating handicapped children in the Commonwealth.

Given the foregoing, there is no basis on which to conclude that special education in Massachusetts is a function "traditionally exclusively reserved to the state." Special education historically has been a function performed primarily by private institutions, and is now a function performed by public and by private schools. Because the education of handicapped children is not traditionally an exclusive state function, the action of a private school which provides such education is not state action under the public function doctrine developed by this Court. *Flagg Bros., Inc.* v. *Brooks*, *supra; Jackson* v. *Metropolitan Edison Co.*, *supra.* As the petitioners rely solely on a public function theory of state action to advance their claim that New Perspectives School is subject to the Fourteenth Amendment, the judgment of the First Circuit dismissing their claims should be affirmed.

The petitioners attempt to avoid the conclusion required by *Flagg Bros.* by the extraordinary expedient, which appears throughout their brief, of declaring that the special education provided in private schools is "public education".[14] This argument simply begs the principal question raised in this case: whether Chapter 766 has converted traditionally private institutions into public actors.

The private school which is the subject of this dispute, and the members of the Association, are private institutions "in the ordinary meaning of that term." *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 171. They are independent corporate bodies, independently governed, operating on private property. *See. e.g.*, *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 16-17. Many of the private special education schools in Massachusetts were established prior to the enactment of Chapter 766; several in the last century. Appendix A. Historically, they have provided, and continue to provide, special education for handicapped children independent of the provisions of Chapter 766 or any prior program of government funding. None have surrendered their right to pursue independent policies because they have accepted students on state funded scholarships. *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25.

In enacting Chapter 766, the Legislature preserved not only the traditional role of private institutions in providing special education to handicapped children, but also the traditional independence of the private schools in the management of their own

[14] In this regard, the petitioners place principal reliance on *Ambach* v. *Norwick*, 441 U.S. 68 (1979). But *Ambach* does not assist their cause. *Ambach* decides that a state may, within the constraints of the Equal Protection Clause, preclude aliens from teaching in the public schools. The case rests on a conclusion that education provided in *public* schools is a public function. The case says nothing whatever about education provided in private schools and nowhere suggests that private schools become state actors where they have agreed to educate publicly funded schoolchildren referred to them by the state. If anything, *Ambach* preserved the distinction between the public and private spheres in education, in that the Court relied for its decision on the existence of a private sector, independent of state regulation, where alien teachers would be permitted to teach.

internal affairs, particularly where necessary to preserve freedom of association and philosophical integrity. For example, Chapter 766 does not authorize the state to control the educational policies of the schools or to direct or advance any educational philosophy,[15] or to require the admission of any particular student,[16] or to require the hiring or firing of any faculty,[17] or to require the adoption of any particular educational program.[18]

On the contrary, as it pertains to private schools, the statutory scheme requires only that the school committees identify school age children with special needs, that they propose an individual educational plan to meet those needs, and that they seek out, when necessary to implement that plan, an appropriate private place-

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[15] With regard to educational policy, a private school seeking approval as a Chapter 766 provider is only required to submit:

> "a complete behaviorally specific description of the education and treatment services which it is prepared to offer to children in need of special education, including a statement of the types of educational goals it is prepared to help such children achieve; the methods it will use to achieve such goals; and the provision for instruction, regular liaison with an involvement of parents in the program of each child." 603 CMR 803.1. *See also* Department of Education Guidelines for Approval of Private Schools Under Chapter 766 ("Guidelines"), Section 200.01. (A-43).

[16] The administrator of special education in any school district is responsible for finding an appropriate placement for a child. If unable to do so:

> "he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child." 603 CMR §504.4(a). (A-42).

[17] The regulations of the Department require only that the school have available in writing its current personnel policies and practices. "Guidelines", §201.01. (A-44). "The content of the school's policies, including criteria and procedures for hiring and firing, has been left to the discretion of the school's management." *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25.

[18] Chapter 766 requires that the curriculum at an approved private provider of special education be "equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth." Mass. Gen. Laws Ann. c. 71B, §10. However, the same standard is required of all private schools in the commonwealth which are approved as alternatives to the public schools under the compulsory education law. Mass. Gen. Laws Ann. c. 76, §1.

ment for the child. Mass Gen. Laws Ann. c. 71B, §3; 603 CMR 504.2. If the state or school committee refers a child to a private school, and if the school agrees to accept the child, the school committee may enter into a purchase of service contract with the school, wherein the school committee agrees to pay the school the cost of the education and services actually rendered to the child and the school agrees to comply with all elements of the child's individual educational plan. Mass. Gen. Laws Ann. c. 71B, §10; 603 CMR 504.2(c). (A.-42). While the state may thus direct a particular educational program for a child, if the school committee is dissatisfied with any private placement, its only recourse is to remove the child from the program. Mass. Gen. Laws Ann. c. 71B, §3.[19] The school committee is not empowered to alter the educational program offered by the school.

In sum, although the state requires compliance with a considerable body of regulatory material whenever a private school enters into a contract to provide education to a child referred pursuant to Chapter 766, *Rendell-Baker* v. *Kohn*, *supra*, 641 F.2d at 25,[20] the state has refrained from regulating in those areas which

[19] Section 3 of Chapter 71B provides for periodic evaluation of a child's progress in an educational program. "If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned."

[20] The First Circuit found as follows:

> Plaintiffs would have us infer state domination from the regulations to which the school is subject. The school is regulated by a number of state and local agencies, and some of these regulations are very detailed. But we are not persuaded that the school's "freedom of decision-making has . . . been circumscribed substantially more than that generally accorded an independent contractor." *McQueen* v. *Drucker*, 438 F.2d at 784-85. The degree of state regulation here is not greater than that exercised over the utility in *Jackson* v. *Metropolitan Edison*, 419 U.S. 345. Each of the various kinds of regulations to which the school is subject would apply as well to a private institution which contracted with the state to educate one student or to conduct one small program in return for a small amount of funds. . . . [A]spects of the school's operation which do not relate directly to services to students are left to the discretion of the school's privately appointed management, just as other government contractors are left free to manage their own affairs so long as they provide the services for which they have contracted." 641 F.2d at 25.

would impinge on the educational independence or philosophical integrity of the private schools. *See Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). The private schools remain free, within the statutory scheme, to control their own affairs. *Rendell-Baker* v. *Kohn*, *supra*, at 25.

Given that the operation of private schools providing special education is independent of state control, the petitioners' contention that Chapter 766 education provided in private schools is "public" education and "traditionally exclusively a function of the state" rests on the fact that such education is publicly funded.[21]

The petitioners' advance two arguments in support of this contention, neither of which takes into account the fact that publicly funded special education has, in Massachusetts, traditionally been a function of private schools as well as public institutions.

The petitioners' first argument is, in substance, that publicly funded special education is a function exclusively reserved to the state because the state has an exclusive call on public funds. The argument is tautological. The question is not whether the state has

[21] The petitioners admit as much in the question they have presented for review and in their brief:

> "[I]t should not be necessary to find that the function of providing *publicly funded* special education was traditionally exclusively reserved to the state..."; "The state's delegation to an ostensibly private school of its statutory obligation to provide *publicly funded special education* must not be confused with the routine sharing of the state's educational duties with ordinary private schools." Br. at 21 and 17, n. 21 (emphasis added).

The petitioners place some minimal reliance on two other factors in attempting to distinguish private special education schools from private schools generally. *See* Br. at 17, n. 21. They argue that private special education schools are distinguished from private schools because special education is available to handicapped children "by right" and that handicapped children are "assigned" to the private schools they attend.

Regarding the first point, publicly funded education is available to all children "by right". Special education pursuant to Chapter 766 is not an exception to that rule. On the contrary, Chapter 766 was enacted to conform the rights of handicapped children to the rights of children generally.

Nor does the assertion that handicapped children may receive public funding only at an "assigned" school distinguish private special education schools from private schools generally. Handicapped children are not assigned to private schools. They are referred. The schools are not required to accept any student.

the exclusive "power and duty" to provide special education with public funds, but whether publicly funded tuition payments for special education under purchase of service contracts converts private schools into state actors. The cases conclusively establish that public funding does not achieve that result.

Under Massachusetts law, private schools receiving public funds for special education remain private schools. *See, Commonwealth* v. *School Committee of Springfield, supra* (upholding the constitutionality, under the Massachusetts Constitution, of providing public funds to private special education schools); *Perkins School for the Blind* v. *Rate Setting Commission, supra*, Mass. App. Ct. Adv. Sh. (1980) at 1953, 411 N.E.2d at 1322; Mass. Adv. Sh. (1981) at 1513 (private schools providing special education to state funded children are providers of service standing in a contractual relationship to the state).

Moreover, this Court has consistently recognized that financial support of a private entity is insufficient to constitute state action, even where such support is accompanied by extensive regulation. *See Jackson* v. *Metropolitan Edison Co., supra*, 419 U.S. at 369-70 (Marshall, J., dissenting). And, while a state may be precluded from providing aid to private schools which discriminate on the basis of race,[22] or where aid would entangle the state in the religious affairs of a sectarian school, private schools receiving state aid under public entitlement programs are not thereby converted into state actors, even where such aid is deemed to benefit the school and not the student. *Norwood* v. *Harrison*, 413 U.S. 455 (1973).[23]

[22] Of course, there is no suggestion in this case that the Legislature enacted Chapter 766 in order to advance any unconstitutional activity or that the statute furthers an improper purpose.

[23] Thus, a state may provide funds and services, including funds and services for special needs children, to sectarian schools so long as the funds are used for secular purposes and the state is not excessively entangled in the religious affairs of the school. *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Wolman* v. *Walter*, 437 U.S. 229 (1977). A necessary premise of these cases

Apart from the absence of any supporting authority, the argument advanced by the petitioners would prove far too much. Special education is but one of many public entitlement programs where the state provides services through purchase of service contracts with private vendors. A rule of state action which turned on the fact that the state has the exclusive "power and the duty" to spend public funds for such purposes would call into question the private status of an extraordinary range of public service providers, all of which receive fee-for-service payments under legislative entitlement programs regulated by state agencies.[24] A rule extending the public function doctrine to the facts of this case has no rational stopping place and should not be adopted. *See Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S. at 350, n. 7, and 354.

The petitioners' second argument is that publicly funded special education is exclusively a function of the state because a handicapped child may receive publicly funded education at a school approved by the state "and nowhere else." Br. at 25. In this regard, the petitioners would have this Court conclude that an independent school, one of scores of such schools in the Commonwealth, exercises monopoly power over a handicapped child.

This Court, of course, has rejected monopoly status as a test of state action. *Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S.

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is that the receipt of public funds does not impair the private status of private schools. Were this not so, sectarian schools receiving public funds could not fulfill their religious mission. *Stone* v. *Graham*, 449 U.S. 39 (1980).

[24] In Massachusetts alone, at least the following private enterprises would be affected: landlords (106 CMR 305.151 et. seq. (AFDC)), utilities (106 CMR 305.151 et. seq. (AFDC)), fuel suppliers (106 CMR 309.190); grocers (106 CMR 311-14, specifically 311.140 and 314.150 authorizing vendor payments (General relief)); home health care providers (106 CMR 403.401, specifically 403.411); doctors (106 CMR 450.301-02 (Medicaid)); pharmacists (106 CMR 466.001 et. seq.); chair car transporters and taxis (106 CMR 474.018 et seq. and 475.014 et seq. (Medical Assistance)); day care centers (Mass. Gen. Laws Ann. c. 28A, §5). Specifically under Chapter 766, the petitioners' rule would reach pediatricians, psychologists, and social workers who perform core evaluations of handicapped children pursuant to Mass. Gen. Laws Ann. c. 71B, §3; 106 CMR 481.001, 009. *See Bello* v. *South Shore Hospital*, Mass. Adv. Sh. (1981) 2411, 2418.

at 351-52. Were the petitioners correct, the warehouse in *Flagg Bros.* would have been a state actor, because Mrs. Brooks could replevy her furniture from the Flagg Bros. warehouse and nowhere else, and the power company in *Jackson* would have been a state actor because the company was the exclusive source of electric power in certain portions of its service area. *See The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57 at 129, n. 46 (1978). That, of course, is not the law.

In any event, a monopoly analysis of state action has no application to the facts of this case. No single educational institution has "exclusive control over the exercise of the function" of providing special education. *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. at 129. Nor is monopoly analysis theoretically relevant to this case. Monopoly analysis of state action is derived from the view that the Fourteenth Amendment's state action provision was intended "to regulate the exercise of centralized power — a kind of power that might be consciously employed to foreclose individual competition in a free market." Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 Wash. U.L.Q. 757, 766. Chapter 766 has the opposite effect. It preserves the autonomy and independence of the private schools. It insures a handicapped child's access to private schools regardless of his ability to pay. It provides procedures and a forum whereby parents can advocate for their own individual conception of their child's best interest apart from the determination of public institutions.

In short, neither special education, nor even publicly funded special education, is a function traditionally exclusively reserved to the state. Special education, including publicly funded special education, is now and has been traditionally a function of private institutions as well as the public schools. Under this Court's public function doctrine, private schools providing such education are therefore not state actors and their actions are not subject to the restraints of the Fourteenth Amendment.

2. *Tradition and Exclusivity Are Necessary to a Finding of State Action Under the Public Function Doctrine.*

The petitioners have attempted to evade the holding in *Flagg Bros.* by arguing that special education is a public function which satisfies the state action requirement without regard to tradition and exclusivity. The argument is foreclosed. In *Flagg Bros.* this Court rejected the view, adopted by the Second Circuit Court of Appeals as the basis for its decision, that "state action might be found in the exercise by a private party of 'some power delegated to it by the State which is traditionally associated with sovereignty.' " *Flagg Bros., Inc.* v. *Brooks, supra*, 436 U.S. at 155. This Court reversed the Second Circuit's holding that the warehouse in *Flagg Bros.* was a state actor without regard to exclusivity and "carefully confined" the public function doctrine to those instances in which a private actor was delegated a function that traditionally *exclusively* was reserved to the state. *Flagg Bros.* v. *Brooks, supra*, 436 U.S. at 161, 163.[25]

The Court should not abandon carefully confined doctrine in resolving this case. As the Court has recognized: ". . . The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Jackson* v. *Metropolitan Edison Co., supra*, 419 U.S. at 354, n.9. The exclusivity test provides a necessary operational rule of decision where, as here, parallel private and public functions occur.

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[25] The petitioners contend that this case presents the question reserved in *Flagg Bros.* It does not. That question reserved is whether the state might be free to delegate "functions administered with a greater degree of exclusivity by the state and municipalities and thereby avoid the strictures of the Fourteenth Amendment." *Flagg Bros., Inc.* v. *Brooks, supra*, at 163-164. That question preserves the requirement of exclusivity. Because special education, including publicly funded special education, is not a function that has been exclusively administered by the state, and because no state function has been delegated to a private entity (*see* Argument Part I(A)(3)), this case does not present the question reserved in *Flagg Bros.*

An exclusivity test is particularly necessary where, as here, individual private schools provide special education to a mix of publicly funded and privately funded handicapped children. Schools which accept even one publicly funded student operate within an identical contractual arrangement with the state as do schools with one hundred percent publicly funded students.[26] But a doctrine that would convert a private school which accepts one publicly funded student into a state actor simply makes no sense. There could be no factual basis for finding that such a school operated as a public institution.

Nor, absent the requirement of exclusivity, could a public function doctrine be confined to any particular class of institutions providing services under a public entitlement program. As shown (note 24, *supra*), privately owned day care centers, nursing homes, fuel companies, pharmacies, apartment buildings all provide contract services to the public under governmental entitlement programs analogous to the program at issue here. The exclusivity rule is necessary to protect the private rights of these entities from governmental intrusion.

In sum, unless the state action requirement is written out of the Fourteenth Amendment, it is necessary under the Constitution to preserve the distinction between action by the state and private conduct. *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 172. Because "many functions have been traditionally performed by governments," *Flagg Bros., Inc.* v. *Brooks*, *supra*, 436 U.S. at 158, and because there are many governmental functions performed by private entities, the unbounded rule of state action advanced by the petitioners seriously imperils this basic constitutional principle. *See Evans* v. *Newton*, 382 U.S. 296 (1966) (Harlan, J., dissenting). On the other hand, a public function doctrine of state action that requires a private entity to have been delegated a function traditionally and exclusively performed by the state preserves the constitutionally protected freedoms guaranteed to private entities and preserves access to Fourteenth Amendment protections

[26] *See Rendell-Baker* v. *Kohn*, *supra*, 461 F.2d at 25.

in appropriate cases. Particularly where, as here, the protected freedoms at issue are First Amendment rights of association traditionally the subject of this Court's protection, *see Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the public function doctrine of state action should not be expanded.

3. *The Action of a Private, Independent School Providing Special Education Is Not State Action in Any Event Because No Exclusive Function of the State Has Been Delegated.*

In order for the action of a private school to be deemed state action subject to the constraints of the Fourteenth Amendment, this Court's cases require that there has been a delegation of a function traditionally and exclusively reserved to the state. Even the petitioners concede that for a private school to be subject to the Fourteenth Amendment, it must have been "delegated" some "public function". Br. at 17. In this regard, the petitioners assert, without examination or analysis, that the state and its political subdivisions have delegated to a private entity their "statutory obligations to provide suitable public education to students with special learning needs." Br. at 14. The assertion is erroneous. Neither the state nor its political sub-divisions has delegated any of their statutory obligations.

Chapter 766, which is the sole authority for the petitioners' position, requires a school committee to provide "or arrange for the provision of" an appropriate, publicly supported education to each school aged child with special needs. Mass. Gen. Laws Ann. c. 71B, § 3; *Commonwealth* v. *School Committee of Springfield*, *supra*, at 504-07, 417 N.E.2d at 410-11. The statute does not obligate the state to provide special education within its own institutions. On the contrary, the state is expressly permitted, through its departments and the several school committees, to discharge the obligation to provide for special education for school age children with special needs through a variety of means,

including referral to private institutions. Mass. Gen. Laws Ann. c. 71B, § 10. As a corollary, the statute provides parents with procedures and a forum in which to advocate for private alternative education for their handicapped children. *Id.*, § 3; *Amherst-Pelham Regional School Committee* v. *Department of Education*, *supra*, 376 Mass. 480, 381 N.E.2d 922.

Given this statutory scheme, there is no sense in which it is proper to say that the state, by referring children to private schools for special education and by paying the cost of instruction and support rendered to them, has delegated a duty which it is obligated to perform. There is no allegation that the state has delegated its duty to identify school aged children with special needs, or its duty to refer a child to an appropriate school, or its duty to approve a school, or its duty to abide by the procedures required by statute, or its duty to pay for the education and support provided by private schools. *Id.*, §§ 3, 10. On the contrary, this case is predicated on the state having performed the functions required of it by statute: the state has referred certain handicapped children to New Perspectives School and it has paid for the education provided by that institution to those children.

More broadly, this is not a case in which the state has historically performed a function which it has now determined to delegate to private entities. As shown, the state has not, as a historical matter, provided either the day school programs or the residential programs performed by private schools. In this respect, the instant case is fundamentally distinguishable from *Evans* v. *Newton*, where the issue presented was whether the "momentum [the park] acquired as a public facility [was] dissipated" by the appointment of private trustees. 382 U.S. 296, 301 (1966). It was critical to the decision in *Evans* v. *Newton* that the state had attempted to divest itself of a function it had previously performed. The instant case presents opposite circumstances. In enacting Chapter 766, the legislature has extended the availability of state funded private education. It has not delegated to private institutions a function the state had previously performed.

As no function previously performed by the state has been delegated, the petitioner's concept of a "delegated function" is inapplicable to this case. For this independently sufficient reason, the action of a private school providing special education pursuant to Chapter 766 is not state action and not subject to the Fourteenth Amendment.

B. *The Action of a Private, Independent School Providing Special Education for Handicapped Children Is Not State Action Under the Petitioners' Proposed "Balancing of Interests" Test.*

1. *Balancing of Interests Is Not an Appropriate Substitute for Traditional Tests of State Action.*

The petitioners have proposed not only that the Court abandon the carefully confined boundaries of the public function doctrine of state action, but that it abandon all traditional tests of state action in resolving this case. Apparently conceding that the action of a private school which provides special education to state funded scholarship children may not be state action under any of this Court's doctrinal precedents, the petitioners have proposed a new standard: that where there are present some traditional indicia of state action, the Court balance the interests competing for protection to decide the state action question. Br. at 31.

At the outset, it should be noted that the petitioners have not invented a theory of state action. As they acknowledge, this "revisionist" approach to state action has been proposed at least since 1967.[27] Nonetheless, and for very good reasons, this Court has not adopted a balancing of interests test in resolving state action ques-

[27] *See* Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. Cal. L. Rev. 208 (1957). More recent commentators have criticized the "revisionist" proposals as unworkable and theoretically unsound. *See* Choper, *Thoughts on State Action, The "Government Function" and "Power Theory" Approaches*, *supra*, 1979 Wash. U.L.Q. 757; *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57 (1978).

tions. *See Jackson* v. *Metropolitan Edison Co.*, *supra*, at 373 (Marshall, J. dissenting); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 190 (1970) (Brennan, J., concurring and dissenting). Indeed, there are several difficulties with the proposed balancing of interests test which strongly counsel against its adoption.

First, the balancing test proposed by the petitioners is fundamentally circular. As applied, it is not a test of state action at all, but a determination of the merits of a lawsuit *assuming* the existence of state action. Thus, assuming there are present some minimum traditional indicia of state action, the petitioners would have the Court abandon any effort to determine the existence of state action and move directly to consider the merits of a plaintiff's claim.

In the instant case, assuming again some minimum indicia of state action, the Court would be required to balance the teachers' free speech claims against the school's right to formulate and implement its considered view that dissension and turmoil in the school environment are therapeutically contra-indicated for the particular handicapped children for whom the school has undertaken the responsibility of education and care. (*See* J.A. 30-31). The right inherent in a private school to make and implement such a judgment is firmly established. *Pierce* v. *Society of Sisters*, *supra; Meyer* v. *Nebraska*, *supra*. Absent state action, the school is free to develop and implement an independent philosophy of education, even where those policies may conflict with the goals of the majority or further goals the state would be forbidden to pursue. *Evans* v. *Newton*, *supra*, 382 U.S. at 300; *Norwood* v. *Harrison*, *supra*, 413 U.S. at 469. The difficulty is that the petitioners would have this Court balance established rights inherent in the private schools against rights which the petitioners claim to have, but which, in the absence of state action, are not protected by the Constitution. In this way, the "balancing of interests" test avoids decision of precisely the constitutional question it purports to decide. The effect of the test, if adopted, would be to write the state action requirement out of the Fourteenth Amendment.

Second, the petitioners' proposal would draw the federal courts even further into disputes that are primarily private in character. This is so because so much of the private affairs of men and women today are touched by some measure of governmental involvement or control. Thus, a rule which required the federal courts to "balance" the merits of individual claims against associational rights whenever there were present some undefined minimum of traditional indicia of state action would inevitably subject a wide range of private relationships to constitutional scrutiny and control. Such an incursion of the federal judiciary, particularly under a highly questionable theory of state action, should be resisted. *See* Choper, *Thoughts on State Action*, *supra*, at 760-65.

Third, the proposed "balancing of interests" test is an inadequate guide for individual conduct. Under the proposed test, the school would inevitably find itself a state actor with respect to some of its students and not others. Where institutional decisions had to be made which crossed the lines between public and private categories, the institution would be forced to relinquish, for all categories of its students, certain of its rights to self-determination.

For example, as relevant here, if a decision to terminate a teacher for disruptive behavior is likely to be subjected to constitutional scrutiny, a school might well hesitate to take such an action, even though, in its judgment, such a course would be in the best interests of publicly funded and privately funded students alike. In this way, the values protected by the state action requirement — absence of orthodoxy and independence from bureaucratic controls — would be jeopardized for all students, even though parents of some privately funded students would have chosen the school for its adherence to a particular pedagogic view. As a practical matter, the rule proposed by the petitioners would convert private institutions into state actors categorically, notwithstanding the protections of the state action requirement. The petitioners' proposal should be rejected.

2. *Were the Court to Apply a Balancing of Interests Test to this Case, the Decision of that Circuit Dismissing the Petitioners' Claims Would be Affirmed.*

Were the Court to apply a balancing of interests test in this case, it would be required to balance the petitioners' First Amendment claims against the First Amendment associational rights of the school. "Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized." *Jackson* v. *Metropolitan Edison Co.*, *supra*, 419 U.S. at 372 (Marshall, J., dissenting). This case presents just such an instance. The schools' claim to paramount rights in this First Amendment tug of war rests on the indubitable benefits to be derived from the existence of independent, autonomous private schools which can meet the full range of needs of severely handicapped children.

The particular benefits to be derived from the private schools is recognized in Chapter 766 and incorporated in the regulations governing their approval as providers of special education under the statute. Thus, a school seeking approval as a Chapter 766 provider is required to "keep and maintain" a written statement identifying its educational philosophy, goals, and objectives. Guidelines for Approval of Private Schools Under Chapter 766, Section 200.01; 603 CMR 803.1 (A-43). This statement is required to be made available to parents of handicapped children and to each public school referring children to the private institution. *Id.* A school's educational policy is thus recognized as an essential component of its qualifications as an appropriate school for any given handicapped child.

This emphasis on educational philosophy is derived from the particular educational tasks that special education schools have undertaken to perform. The private day and residential schools treat and educate very seriously handicapped children: children with severe emotional handicaps, minimal intellectual function,

multiple and severe physical and sensory disorders, severe learning disabilities, serious social dysfunctions. *See* Appendix B. There is no unanimity of opinion as how best to care for and educate these children.[28] Even with respect to children with less severe handicaps, there is lack of unanimity as to the best course of care and treatment. Because different children thrive and succeed in different education settings, it is essential to the success of a program like Chapter 766 that there be a wide range of educational and treatment alternatives for handicapped children. Such considerations provide the underlying basis of the schools' First Amendment rights. Freedom of association in the broadest sense is necessary not only to the success of the individual schools, it is necessary to the success of the statutory scheme.

There is a second reason why the schools' associational rights are essential to the success of Chapter 766. As discussed above, Chapter 766 was enacted pursuant to a legislative determination to foster significant parent and lay involvement in special education programs. 1972 Mass. Acts c. 766, § 1.

Thus, the statute provides both a forum and procedures whereby parents can be advocates for the best possible educational alternative for their children. Mass. Gen. Laws Ann. c. 71B, § 3. If these proceedures are to achieve the legislature's purposes in involving parents and lay persons, there must be a range of alternatives available from which parents can choose and advocate for the program best suited to their child's individual needs. The value of the private schools in the statutory scheme depends on the individual differences among the schools and on their right to pursue independent educational programs and goals.

Weighed against these values and purposes are the individual teachers' claim of a right to "express their professional opinions, in

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[28] *See, e.g.*, G. Paul and R. Lentz, *Psychological Treatment of Chronic Mental Patients: Milieu Versus Social Learning Programs*, Harvard University Press, Cambridge, 1977; Jack R. Gannon, *Deaf Heritage, A Narrative History of Deaf America*, "War of Methods", National Association of the Deaf, Silver Spring, Maryland, 1981, pp 359-67 (history of oralist versus total communication methodology and the development of American Sign Language).

private and in public, concerning the educational process and how it might be improved." Br. at 38. But, as the petitioners acknowledge, these private school teachers have elected to teach in private schools. They are not required to do so. As a general proposition they would earn more were they to teach in the public schools.[29] Nevertheless, whether because of a personal commitment to the educational philosophy at a particular private school, or because of a disdain of the perceived "orthodoxy and bureaucracy of public education," or because private schools generally provide a "healthy alternative to a homogeneous public school system," Br. at 40, these teachers have not elected to teach in an environment in which their rights to freedom of expression are protected by the Constitution. For so long as they elect to eschew the public schools and teach in private institutions, they have no claim to the protections of the Fourteenth Amendment. They have shown no reason, nor could they, why a private school, and particularly a private school providing special education to handicapped children, should not be free to pursue its own educational goals and implement its own educational policies. A balancing of the interests seeking protection in this case weighs heavily in favor of the school.

Conclusion

For all the foregoing reasons, the decision of the First Circuit Court of Appeals in *Rendell-Baker* v. *Kohn*, 641 F.2d 14 (1st Cir. 1981), should be affirmed.

Respectfully submitted,

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[29] Gail Merrithew, "National Association of Independent Schools Trend Study, Teacher Salaries, 1980", *Education Week*, Vol. 1 No. 13, December 7, 1981, at 17.

APPENDIX A

The Massachusetts Association of 766 Approved Private Schools

INDEX OF MEMBERS

School	*Date of Establishment*
AMEGO, Inc. Day Educational Program Quincy, Massachusetts	Established 1972
AMEGO, Inc. Residential Program Hingham, Massachusetts	Established 1976
AMIC Day School Newton Center, Massachusetts	Established 1973
Arlington School Arlington School/Adolescent Day Service/Waverly House Belmont, Massachusetts	Established 1961
Avalon School Monterey, Massachusetts	Established 1947
Basics, Inc. Boston, Massachusetts	Established 1975
Bay Cove Day Care Center for Children Boston, Massachusetts	Established 1976
Baylies Beginning Center Canton, Massachusetts	Established 1972

School	*Date of Establishment*
Beacon School Brookline, Massachusetts	Established 1973
Behavior Research Institute Providence, Rhode Island	Established 1971
Berkshire Learning Center Pittsfield, Massachusetts	Established 1972
Berkshire Children's Community Great Barrington, Massachusetts	
Beverly School for the Deaf Beverly, Massachusetts	Established 1876
Boston Center for Blind Children Boston, Massachusetts	
Boston College Campus School Chestnut Hill, Massachusetts	Established 1970
Boston School for the Deaf Randolph, Massachusetts	Established 1899
Braintree Mini and PACE Memorial Schools Braintree, Massachusetts	Established 1973
Braintree St. Coletta Day School, Inc. Braintree, Massachusetts	Established 1957
Brandon School Natick, Massachusetts	Established 1966
Cape Cod Child Development Program Hyannis, Massachusetts	Established 1975
Cardinal Cushing School and Training Center Hanover, Massachusetts	Established 1947
Carroll School Lincoln, Massachusetts	Established 1884

School	*Date of Establishment*
Carroll-Hall School Cambridge, Massachusetts	Established 1957
Castle School Cambridge, Massachusetts	Established 1978
Center for Alternative Education Boston, Massachusetts	Established 1969
F.L. Chamberlain School Middleboro, Massachusetts	Established 1976
Charles River Academy Cambridge, Massachusetts	Established 1965
Christ Church Professional Nursery for the Handicapped Andover, Massachusetts	Established 1973
Clarke School for the Deaf Northampton, Massachusetts	Established 1867
Clearway School West Newton, Massachusetts	Established 1975
Community Center for Children with Special Learning Disabilities West Newton, Massachusetts	Established 1967
Community Preschool Therapeutic Nursery Brookline, Massachusetts	Established 1974
Concord-Assabet School, Inc. Concord, Massachusetts	Established 1976
Cotting School for Handicapped Children Boston, Massachusetts	Established 1893
Crotched Mountain Rehabilitation Center Greenfield, New Hampshire	Established 1953

School	*Date of Establishment*
Crystal Springs School, Inc. Assonet, Massachusetts	Established 1954
D-R Mini School Rehoboth, Massachusetts	
Deaconess Home School Fall River, Massachusetts	
Dearborn Elementary School Cambridge, Massachusetts	Established 1949
Dearborn Pre-Vocational Unit Cambridge, Massachusetts	Established 1970
DeSisto of Stockbridge West Stockbridge, Massachusetts	Established 1978
Devereux Schools Rutland, Massachusetts	Established 1965
Dimock Street Preschool Roxbury, Massachusetts	Established 1969
Eagle Hill School Hardwick, Massachusetts	Established 1967
Early Beginning Center Canton, Massachusetts	Established 1974
The Eagleton School Great Barrington, Massachusetts	Established 1979
East Mountain Center Westfield, Massachusetts	
Efficacy Research Institute Taunton, Massachusetts	Established 1975
Efficacy Research Institute of Framingham Framingham, Massachusetts	Established 1980
EWT School (Experiment with Travel) Springfield, Massachusetts	Established 1970
Farr Academy Cambridge, Massachusetts	Established 1972

School	*Date of Establishment*
Fitchburg Center for Brain Injured Children Fitchburg, Massachusetts	Established 1972
Gifford School and Day Care Center Weston, Massachusetts	Established 1965
The Harbor Schools Newburyport, Massachusetts	Established 1965
The Charles Hayden School Dorchester, Massachusetts	Established 1932
The Holden School Charlestown, Massachusetts	Established 1976
Holy Union Special School North Chelmsford, Massachusetts	Established 1967
The Institute for Family and Life Learning Danvers, Massachusetts	Established 1973
Institute Day School at Lowell Lowell, Massachusetts	Established 1965
Italian Home for Children Jamaica Plain, Massachusetts	Established 1919
Kennedy Centers for Handicapped Children Foxboro, Massachusetts	Established 1971
Kennedy Memorial Hospital Day School Brighton, Massachusetts	Established 1964

School	*Date of Establishment*
Robert F. Kennedy Action Corps Boston, Massachusetts	Established 1969
The Kolburne School, Inc. New Marlborough, Massachusetts	Established 1947
Laboure Center South Boston, Massachusetts	Established 1907
Lakeside School West Peabody, Massachusetts	Established 1967
Landmark School Beverly, Massachusetts	Established 1971
Language and Cognitive Development Center Jamaica Plain, Massachusetts	Established 1965
Lawrence Rehabilitation Services Center Lawrence, Massachusetts	Established 1969
League School of Boston Newtonville, Massachusetts	Established 1966
The Learning Center for Deaf Children Framingham, Massachusetts	Established 1970
Learning Center for the Multiply Handicapped Watertown, Massachusetts	Established 1949
The Ledges Hopedale, Massachusetts	Established 1959
Leland Hall School Norfolk, Massachusetts	Established 1974
Lincoln Hill Day School Foxboro, Massachusetts	

School	*Date of Establishment*
Linden Hill School Northfield, Massachusetts	Established 1961
Little House Alternative School Dorchester, Massachusetts	Established 1973
Longview Farm Walpole, Massachusetts	
Lovering School Taunton, Massachusetts	Established 1979
The Lynnshore School Lynn, Massachusetts	Established 1972
Madonna Hall Marlboro, Massachusetts	Established 1867
Mann Unit Jackson-Mann School Allston, Massachusetts	Established 1975
Manville School Boston, Massachusetts	Established 1957
Maple Valley School Wendell Depot, Massachusetts	Established 1973
Massachusetts Association for the Blind Deaf/Blind Program Brookline, Massachusetts	Established 1971
Massasoit School Norwood, Massachusetts	
Mathoms Adolescent Day Treatment Program Brockton, Massachusetts	Established 1975
May Institute for Austistic Children, Inc. Chatham, Massachusetts	Established 1955

School	*Date of Establishment*
McAuley Nazareth Home for Boys Leicester, Massachusetts	Established 1901
Milford Assistance Program Milford, Massachusetts	Established 1974
Mill Pond School Springfield, Massachusetts	Established 1976
Nazareth Child Care Center Jamaica Plain, Massachusetts	Established 1864
Nazareth Hall and Vocational Center Fall River, Massachusetts	Established 1957
Nazareth Hall-on-the-Cape Hyannis, Massachusetts	Established 1960
New England Home for Little Wanderers Boston, Massachusetts	Established 1865
New Perspectives School, Inc. Brookline, Massachusetts	Established 1971
Norfolk Clinical Children's Center Westwood, Massachusetts	Established 1958
Northampton Center for Children and Families Northampton, Massachusetts	Established 1975
Open Road School Waltham, Massachusetts	
Osborn Day School West Springfield, Massachusetts	Established 1973

School	*Date of Establishment*
Doctor Franklin Perkins School Lancaster, Massachusetts	Established 1896
Perkins School for the Blind Watertown, Massachusetts	Established 1829
Project EISEC University Hospital, Inc. Boston, Massachusetts	Established 1977
Protestant Youth Center Baldwinville, Massachusetts	Established 1961
Residential Rehabilitation Centers, Inc. Brewster, Massachusetts	Established 1970
River Street School Hyde Park, Massacusetts	Established 1972
Riverview School East Sandwich, Massachusetts	Established 1957
St. Ann's Home, Inc. Methuen, Massachusetts	Established 1925
St. Anne's School of Arlington, Inc. Arlington, Massachusetts	Established 1928
St. Mary's Home for Children New Bedford, Massachusetts	Established 1894
St. Vincent's Home and School Fall River, Massachusetts	Established 1894
Schools for Children Cambridge, Massachusetts	Established 1949
South Shore Center for Brain-Injured Children Braintree, Massachusetts	Established 1975

School	*Date of Establishment*
Spaulding Youth Center Tilton, New Nampshire	Established 1958
Edna Stein Academy Brookline, Massachusetts	Established 1971
Anne Sullivan Center Tewksbury, Massachusetts	Established 1971
Therapeutic Center for the Multiply Handicapped Brookline, Massachusetts	Estsblished 1974
Thom Montessori School Boston, Massachusetts	Established 1921
The Kathleen Thornton School Springfield, Massachusetts	Established 1964
Valley View Farm North Brookfield, Massachusetts	Established 1970
Valleyhead, Inc. Lenox, Massachusetts	Established 1969
Walker Home and School Needham, Massachusetts	Established 1962
Warren Center Brookline, Massachusetts	
Robert White School Boston, Massachusetts	Established 1972
Willie Ross School for the Deaf, Inc. Longmeadow, Massachusetts	Established 1967
Willow Hill School Sudbury, Massachusetts	Established 1970
Wreath School Middleton, Massachusetts	Established 1973

APPENDIX B

The Massachusetts Association of 766 Approved Private Schools

DISABILITY CLASSIFICATION INDEX

ALL SPECIAL NEEDS
Braintree St. Coletta Day School

ALTERNATIVE HIGH SCHOOL
Little House Alternative School
New Perspectives School
Open Road School

APHASIC
Boston School for the Deaf
Fitchburg Center for Brain-Injured Children, Inc.
Kennedy Memorial Hospital
Learning Center for Multiply Handicapped
Leland Hall School

AUTISTIC
Amego, Inc.—Day Educational Program
Amego, Inc.—Residential Program
Avalon School
Devereux Schools
Efficacy Research Institute
Fitchburg Center for Brain-Injured Children, Inc.
League School
May Institute for Autistic Children
PACE
Project EISEC
Spaulding Youth Center

BEHAVIORAL AND PHYSICAL NEEDS
Osborn Day School

BEHAVIORALLY DISORDERED
Bay Cove Day Center
Braintree Mini School
Dearborn Prevocational Unit
Devereux Schools
Farr Academy
Gifford School
Harbor School
Holden School
Institute for Family and Life Learning
Italian Home for Children
Madonna Hall
Mathoms
Nazareth Child Care Center
Nazareth Hall-on-the-Cape
New England Home for Little Wanderers
New Perspectives School
Open Road School
Residential Rehabilitation Centers
St. Ann's Home
St. Mary's Home for Children
St. Vincent's Home and School
Spaulding Youth Center
Valley View Farm
Walker Home and School
Wreath School

BLIND
Learning Center for Multiply Handicapped
Mass. Assoc. for the Blind
Perkins School for the Blind
Project EISEC

DEAF
Beverly School for the Deaf
Boston School for the Deaf
Clarke School for the Deaf
Learning Center for Deaf Children
Learning Center for the Multiply Handicapped
Mass. Assoc. for the Blind
Perkins School for the Blind
Wille Ross School for the Deaf

DEVELOPMENTAL DISABILITIES
Avalon School
Dimock Street Pre-School
Fitchburg Center for Brain-Injured Children, Inc.
Nazareth Hall and Vocational Center
South Shore Center for Brain-Injured Children
Anne Sullivan Center

DYSLEXIA
Beacon School
Carroll School
Landmark School

EMOTIONALLY DISTURBED
AMIC Day School
Arlington School

EMOTIONALLY DISTURBED (Continued)
Avalon School
Bay Cove Day Center
Beacon School
Behavior Research Institute
Berkshire Learning Center
Boston-Brookline Collaborative
Boston College Campus School
Carroll Hall School
F. L. Chamberlain School
Charles River Academy
Community Pre-School Therapeutic Nursery
Concord-Assabet School
D-R Mini School
Walter F. Dearborn Elementary School
Dearborn Prevocational Unit
Dearborn Secondary Program
Devereux Schools
Efficacy Research Institute
EWT—Experiment with Travel
Farr Academy
Gifford School
Harbor School
Charles Hayden School
Holy Union Special School
Institute for Family and Life Learning
Italian Home for Children
Kolburne School
Lakeside School
League School
Little House Alternative School
Madonna Hall
Manville School

EMOTIONALLY DISTURBED (Continued)
Mathoms
McAuley Nazareth Home
Milford Assistance Program
Mill Pond School
Nazareth Child Care Center
Nazareth Hall-on-the-Cape
New Perspectives School
Norfolk Clinical Center
Northampton Center for Children and Families
Open Road School
Osborn Day School
Our Lady of Providence Children's Center
Dr. Franklin Perkins School
Residential Rehabilitation Centers
St. Ann's Home
St. Anne's School
St. Mary's Home for Children
St. Vincent's Home and School
Spaulding Youth Center
Kathleen Thornton School
Valley View Farm
Valleyhead
Walker Home and School
Robert White School
Wreath School

HEARING IMPAIRED
Boston College Campus School
Mann Unit—Jackson Mann School

LANGUAGE IMPAIRED
Dimock Street Pre-School
League School
Learning Center for the Deaf
Little House Alternative School
Valleyhead

LEARNING DISABLED
Beacon School
Berkshire Learning Center
Boston-Brookline Collaborative
Carroll School
Carroll-Hall School
F. L. Chamberlain School
Charles River Academy
Walter F. Dearborn Elementary School
Dearborn Secondary Program
Eagle Hill School
Efficacy Research Institute
Farr Academy
Gifford School & Day Center
Charles Hayden Inn School
Kolburne School
Landmark School
Learning Center for Multiply Handicapped
Leland Hall
Linden Hill School
Madonna Hall
Mathoms
Nazareth Child Care Center
Nazareth Hall-on-the-Cape

LEARNING DISABLED (Continued)
Riverview School
St. Mary's Home for Children
St. Vincent's Home and School
Willow Hill
Wreath School

LEARNING IMPAIRED
Holden School
Learning Center for the Deaf
Little House Alternative School
Valleyhead

MENTALLY RETARDED
Boston College Campus School
Learning Center for the Multiply Handicapped
South Shore Center for Brain-Injured Children

MILDLY EMOTIONALLY DISTURBED
Basics, Inc.
Dearborn Secondary Program

MILDLY RETARDED
Holden School
League School
Anne Sullivan Center

MODERATELY RETARDED
Holden School
Dr. Franklin Perkins School

MULTIPLY HANDICAPPED
Boston College Campus School
Christ Church Professional Nursery
Crystal Springs School
Holy Union School
Kennedy Center for Programs in Early Development
Learning Center for Multiply Handicapped Children
Mass. Assoc. for the Blind

PERCEPTUALLY HANDICAPPED
Beacon School
Eagle Hill School
Holy Union School
Landmark School
Leland Hall

PHYSICALLY HANDICAPPED
Baylies Beginning Center
Cotting School
Holy Union School
Kennedy Memorial Hospital
South Shore Center for Brain-Injured Children
Anne Sullivan Center
Valleyhead

PRESCHOOL FOR MULTIPLY HANDICAPPED
Dimock Street Pre-School
Early Beginning Center
Kennedy Center for Programs in Early Development
Anne Sullivan Center

RETARDED
Devereux Schools
Efficacy Research Institute
Kennedy Center for Programs in Early Development
Residential Rehabilitation Centers

SEVERELY MULTIPLY HANDICAPPED
Crotched Mountain Rehabilitation Center
Fitchburg Center for Brain-Injured Children
Project EISEC
South Shore Center for Brain-Injured Children

SOCIAL/EMOTIONAL/ACADEMIC PROBLEMS
Center for Alternative Education

APPENDIX C

Constitutional, Statutory, and Regulatory Provisions

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Massachusetts General Laws, Chapter 69, former Section 26 (West 1969):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such deaf, such blind and such aphasic persons as it considers proper subjects for education, for a term not exceeding twelve years to the American School at Hartford, for the Deaf, in the State of Connecticut, to the Clarke School for the Deaf at Northampton, to the Horace Mann School at Boston, to the Beverly School for the Deaf at Beverly, to the Boston School for the Deaf at Randolph, the Rhode Island School for the

Deaf, at Providence, Rhode Island, to any other school for the deaf or school affording remedial treatment for the deaf within or without the commonwealth, as the parents or guardians may prefer, or to the Perkins School for the Blind or any other school within or without the commonwealth which provides instruction to the blind; or to any school within or without the commonwealth which provides instruction for aphasic persons; provided, that each of said schools shall offer in the ninth, tenth, eleventh and twelfth years an educational curriculum equivalent to that in the secondary schools of the commonwealth, as determined by the department. Upon like request and with like approval, the department may continue for a longer term the instruction of any of such persons who are meritorious pupils recommended by the principal or other chief administrator of the school which they attend. With the approval of the governor the department may, at the expense of the commonwealth, make such provision for the care and education of children who are both deaf and blind or both mentally retarded and blind as it may deem expedient. No such pupil shall be withdrawn from such institutions or schools except with the consent of the authorities thereof or of the department; and the expenses of the instruction and support of such pupils therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability may be required by the department to reimburse the commonwealth therefor.

Amended by St.1935, c. 286; St.1945, c. 524; St.1951, c. 673, § 6A; St.1952, c. 498, § 1; St.1957, c. 582; St.1958, c. 508; St.1964, c. 497.

Repealed by St. 1972, c. 766, § 8, recodified as Chapter 71B, §§ 8, 10, 13.

Massachusetts General Laws, Chapter 69, former Section 29B (West 1969):

One half of the cost of the expenses of the instruction, training and support of the children in the special classes or special instruction periods provided under section forty-six, forty-six A, forty-six H, forty-six K, and forty-six L of chapter seventy-one, and sections twenty-nine and thirty-two of this chapter, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be reimbursed to the towns or any regional school district by the commonwealth upon approval of the department and certification by it that such classes or special instruction periods meet the standards and requirements prescribed by it. The department shall reimburse a city or town in which resides a child who attends a clinical nursery school established under section thirteen B of chapter one hundred and twenty-three or a child who, because of insufficient class room space in a community clinical nursery school, attends a clinical nursery school, day care center or other institution for the care, education or treatment of retarded children conducted by an accredited school or college within the commonwealth, as provided in said section thirteen B, or a retarded person who attends an educational, habilitational or day care program or facility of the department of mental health, as provided under section thirteen C of said chapter one hundred and twenty-three, by paying to it one half the cost of the transportation of each such child and the full cost of each such adult to and from such educational, habilitational or day care program or facility, as the case may be, on each day it is in session.

Added by St.1954, c. 514, § 3. Amended by St.1955, c. 626, § 1; St.1956, c. 535, § 1; St.1957, c. 615, § 3; St.1960, c. 627; St.1960, c, 750, § 2; St.1966, c. 501, § 2; St.1966, c. 647, § 2; St.1967, c. 874, § 1; St.1968, c. 617, § 1.

Repealed by St. 1972, c. 766, § 8, recodified as Chapter 71B, §§ 5, 8, 13.

Massachusetts General Laws, Chapter 71, former Section 46I (West 1969):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such emotionally disturbed children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within or without the commonwealth, affording remedial treatment for emotionally disturbed children for terms not exceeding twelve years, under regulations prescribed by the departments of education and mental health. The department may, upon like request and with like approval, continue for longer terms the education of any children therein who are meritorious pupils recommended by the principal or other chief administrative officer of such school, hospital, sanatorium or like institution.

The expenses of the instruction and support of such children therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability may be required by the department to reimburse the commonwealth therefor.

Added by St.1960, c. 750, § 1.

Repealed by St. 1972, c. 766, § 10, recodified as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71, former Section 46L (West 1969):

The department, under regulations prescribed jointly by the departments of education, public health, and mental health, and upon the request of the parents or guardians and with the approval of the governor, may send such children having the specific learning disabilities described in section forty-six K as it considers proper subjects for special training and instruction

to any school wothin the commonwealth affording remedial treatment for such children. The department may continue the special education of such children for such terms as may be recommended by the principal or other chief administrative officer of such school.

Added by St.1966, c. 647, § 1.

Repealed by St.1972, c. 766, § 10, recodfied as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71, former Section 46M (West):

The department may, upon the request of the parents or guardians and with the approval of the governor, send such physically handicapped children as it considers proper subjects for education to any school, hospital, sanatorium or like institution, within the commonwealth, affording remedial treatment for physically handicapped children for terms not exceeding twelve years, under regulations prescribed by the departments of education and public health. The department may, upon like request and with like approval, continue for longer terms the education of any children therein who are meritorious pupils recommended by the principal or other chief administrative officer of such school, hospital, sanatorium or like institution.

The expenses of the instruction and support of such children therein, actually rendered or furnished, including their necessary traveling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, shall be paid by the commonwealth out of the proceeds of the tax on income; but the parents or guardians of such children, who are able wholly or in part to provide for their support and care, to the extent of their ability, may be required by the department to reimburse the commonwealth therefor.

Added by St.1968, c. 695.

Repealed by St. 1972, c. 766, § 10, recodified as Chapter 71B, §§ 3, 10.

Massachusetts General Laws, Chapter 71B, Section 1 (West Supp. 1981):

The following words as used in this chapter, unless the context requires otherwise, have the following meanings: "Department", the department of education; "School age child", any person of ages three through twenty-one who has not attained a high school diploma or its equivalent; "School age child with special needs", a school age child who, because of temporary or more permanent adjustment difficulties or attributes arising from intellectual, sensory, emotional, or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof, is unable to progress effectively in a regular school program and requires special classes, instruction periods, or other special education services in order to successfully develop his individual educational potential; "Regular education", the school program and pupil assignment which normally leads to college preparatory or technical education or to a career; "Special education", educational programs and assignments, namely special classes, programs or services designed to develop the educational potential of children with special needs including but not limited to educational placements of children by school committees, the departments of public health, mental health, and youth services and the department of social services in accordance with the regulations of the department of education; "School age child requiring special education", any child with special needs who requires special education as determined in accordance with the regulations set forth by the department.

Added by St.1972, c. 766, § 1. Amended by St.1978, c. 552, § 18.

Massachusetts General Laws, Chapter 71B, Section 2 (West Supp. 1981):

The department shall promulgate, in cooperation with the departments of mental health, public health and social services, regulations regarding programs for children with special

needs including but not limited to a definition of special needs; provided, however, that such definition shall emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure the maximum possible development of a child with special needs, and, provided further, that such definition shall be sufficiently flexible to include children with multiple special needs. Children receiving or requiring special education shall be entitled to participate in any of the following programs: (1) additional direct or indirect instruction consultation service, materials, equipment or aid provided children or their regular classroom teachers which directly benefits children requiring special education; (2) supplementary individual or small group instruction or treatment in conjunction with a regular classroom program; (3) integrated programs in which children are assigned to special resource classrooms but attend regular classes to the extent that they are able to function therein; (4) full-time special class teaching or treatment in a public school building; (5) teaching or treatment at home; (6) full-time teaching or treatment in a special day school or other day facility; (7) teaching or treatment at a hospital; (8) teaching or treatment at a short or long term residential school; (9) occupational and pre-occupational training in conjunction with the regular occupational training program in a public school; (10) occupational and pre-occupational training in conjunction with full-time special class teaching in a public school building, at home, special day school or other day facility, hospital, or short or long-term residential school; (11) any combination or modification of programs (1) through (10) or other programs, services, treatments or experimental provisions which obtain the prior approval of the department.

Admission to such programs on the pre-school level at an earlier age than at which schooling is ordinarily provided shall be regulated by the department in conjunction with the departments of public health and mental health and shall be

restricted to children with substantial disabilities who are judged by said departments to require such programming.

No child shall be assigned to a special education class unless it is first determined by an evaluation of the child's needs and the particular special education program that the child is likely to benefit from such program; periodically thereafter, and in no event less often than annually the child and his program shall be reevaluated to determine whether said child is benefiting from said program in accordance with the procedures set forth in section three. In the event that said program is not benefiting the child and that another program may benefit the child more, or said program has benefited the child sufficiently to permit reassignment, the child shall be reassigned, and in the event of consistent failure of a program to benefit children there assigned, the program shall be abolished or altered.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 19.

Massachusetts General Laws, Chapter 71B, Section 3 (West Supp. 1981):

In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.

No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.

No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.

Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as

may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available, in accordance with regulations promulgated jointly by the departments of education, mental health, public health and social services in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the depart-

ments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parents, guardians or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such a showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the

matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians or persons with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Evaluations and assessments of children and special education programs shall remain confidential and be used solely for the administration of special education in the commonwealth, including, but not limited to, inspection by the department and regional and state advisory councils to insure that every special education program does benefit the children there assigned.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 20.

Massachusetts General Laws, Chapter 71B, Section 4 (West Supp. 1981):

The school committee of any city, town or school district may, to meet its obligations under section three, with the approval of the department enter into an agreement with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district.

In the case of an agreement between school committees to jointly provide special education, said agreement shall designate one city, town or school district as the operating agent. Funds received by such operating agent from other cities, towns or school districts or appropriated by such operating agent for the purposes of such agreement, in addition to gifts and grants shall be deposited with and held as a separate account by its treasurer. The school committee may apply said funds to the costs of programs operated pursuant to the agreement without further appropriation.

Added by St.1972, c. 766, § 11.

Massachusetts General Laws, Chapter 71B, Section 10 (West Supp. 1981):

The department may, on an annual renewal basis, upon the request of the parents or guardians and the recommendations of a local school committee and a regional branch of the division of special education, and with the approval of the secretary of educational affairs refer children requiring special education to any institution within or without the commonwealth which offers curriculum, instruction and facilities which are appropriate to the child's needs and which are approved by the department under regulations prescribed by the departments of education, mental health and public health. The curriculum at such an institution must for approval be

equivalent, insofar as the department deems feasible, to the curriculum for children of comparable age and ability in the public schools of the commonwealth.

Before acting on said request the department shall determine the nature and extent of a child's special needs, shall require the local school committee and regional advisory council to prepare and submit plans detailing the time needed to establish facilities adequate for children with special needs in the city, town or school district where the child resides, and shall ascertain whether adequate facilities and instruction programs are available or when adequate facilities can be made available in the city, town or school district where the child with special needs resides. Until adequate facilities can be made available, such child shall be placed in the most aequate program available as determined by the department. The department shall further define by regulation the circumstances in which it shall be directly responsible for the placement of children in such special education programs, and by standards available to the public determine the methods and order of such placements; provided, however, that no child shall be denied access to any program operated by the department of mental health, public health or social services to which in the judgment of the operating department the child should be admitted.

The expenses of the instruction and support actually rendered or furnished to such children with special needs, including their necessary travelling expenses, whether daily or otherwise, but not exceeding ordinary and reasonable compensation therefor, may be paid by the commonwealth; but the department shall issue regulations jointly with the departments of mental health, public health, youth services and social services defining the circumstances in which the commonwealth shall bear all or part of such cost, the circumstances in which school committees shall be required to bear part or all of such cost, and the circumstances in which a parent or guardian may be required to reimburse the commonwealth for part or all of such cost; provided, however,

that in no event shall the cost to the school committee for placement under this section be less than the average per pupil cost for pupils of comparable age within the city, town or school district; and, provided further, that in determining the cost to the parent or guardian, if any, no charge shall be made for any educational cost but only for support and care. In determining the cost to the parent or guardian the department shall apply criteria which take into account relative ability to pay.

The department shall direct and supervise the education of all such children, and the commissioner of education shall state in his annual report their number, the cost of their instruction and support, the manner in which the money appropriated therefor has been expended, to what extent reimbursed and such other information as he deems important.

Nothing contained herein shall affect the continued authority of the departments of mental health and public health over all non-educational programs and all treatment for residents or patients in institutions under their control.

Added by St.1972, c. 766, § 11. Amended by St.1978, c. 552, § 21.

Massachusetts Acts and Resolves, St. 1972, c. 766, § 1.

. . .

Recognizing, finally, that present adequacies and inequities in the provision of special education services to children with special needs have resulted largely from a lack of significant parent and lay involvement in overseeing, evaluating and operating special education programs, this act is designed to build such involvement through the creation of regional and state advisory committees with significant powers and by specifying an accountable procedure for evaluating each child's special needs thoroughly before placement in a program and periodically thereafter. . . .

Massachusetts General Laws, Chapter 76, Section 1 (West Supp. 1981):

Every child between the minimum and maximum ages established for school attendance by the board of education, except a child between fourteen and sixteen who meets the requirements for the completion of the sixth grade of the public school as established by said board and who holds a permit for employment in private domestic service or service on a farm, under section eighty-six of chapter one hundred and forty-nine, and is regularly employed thereunder for at least six hours per day, or a child between fourteen and sixteen who meets said requirements and has the written permission of the superintendent of schools of the town where he resides to engage in non-wage-earning employment at home, or a child over fourteen who holds a permit for employment in a cooperating employment, as provided in said section eighty-six, shall, subject to section fifteen, attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the board of education in each school year, unless the child attends school in another town, for said number of days, under sections six to twelve, inclusive, or attends an experimental school project established under an experimental school plan, as provided in section one G of chapter fifteen, but such attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable subject to the provisions of section three of chapter seventy-one B or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. The superintendent of schools may transfer to any specialized type of school on a full-time basis any child who possesses the educational qualifications enumerated in this section and in the opinion of the superintendent would be benefited by such transfer. The superintendent, or teachers in so far as authorized by him or

by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half day sessions in any period of six months. Absences may also be permitted for religious education at such times as the school committee may establish; provided, that no public funds shall be appropriated or expended for such education or for transportation thereto; and provided, further, that such time shall be no more than one hour each week. For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum, nor because pupils of the public schools in a particular city or town are not actually receiving such transportation.

The school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith.

The terms "permit for employment" and "employment permit", as used in this chapter, shall mean an employment permit referred to in section eighty-six of chapter one hundred and forty-nine.

Amended by St.1971, c. 437; St.1971, c.875; St.1972, c. 100, § 3; St.1972, c. 766, § 12.

REGULATORY PROVISIONS

Regulations, Massachusetts Department of Education, July, 1981. 603 Code of Massachusetts Regulations (CMR) 502:

502.4 *Substantially separate program.*

Each school committee shall provide a program within this prototype to each child in need of special education for whom the IEP specifies such a program. Programs within this prototype shall have the following characteristics:

502.4(a) The child shall be assigned to a program or programs made up entirely of children in need of special education.

502.4(b) In each program the number of children for each teacher shall not exceed eight, and for each teacher with an aide, shall not exceed twelve.

502.4(c) The ages of the youngest and oldest child in each program shall not differ by more than forty-eight months. A written request for approval of a wider age range may be made to the Division, through its Regional Branch Office, which may approve such request.

502.4(d) The grouping of children in each program shall be compatible with the methods and goals stated in each child's IEP.

502.4(e) The child shall leave the program to receive services and to participate in activities specified by the Administrator of Special Education pursuant to ¶ 322.4(e) and by the TEAM pursuant to ¶ 322.1(f).

502.4(f) The daily duration of the child's program shall be equal to that of the regular school day, unless the Administrator of Special Education states that a shorter or longer duration is in the child's best interests. In such a case the duration of the child's program shall be that specified by the Administrator of Special Education.

502.4(g) For each child placed in this prototype, the school committee shall provide or arrange to have provided, to implement the child's IEP, the personnel specified by the Administrator of Special Education.

502.4(h) Each school committee shall provide all aspects of programs within this prototype within public school regular education facilities, except as provided under ¶ 502.4(i).

502.4(i) Notwithstanding ¶ 502.4(h), a school committee may operate a substantially separate special education program in a facility other than a public school regular education facility, provided that the program is reviewed and approved by the Regional Branch Office of the Division prior to implementation. Such review and approval shall be required annually, as part of the school committee's annual program plan under ¶ 501.2. A program approved under this paragraph shall be considered more restrictive than a ¶ 502.4 program conducted in a public school regular program under ¶¶ 502.5 or 502.6. In order for a program to be approved

under this paragraph, the school committee shall submit to the Regional Branch Office of the Division written evidence that:

502.4(i)(i) The program meets the requirements of ¶¶ 502.4(a) through 502.4(g), inclusive.

502.4(i)(ii) The school committee cannot operate the program within a public school regular education facility for programmatic reasons.

502.4(i)(iii) The school committee has incorporated into the program procedures for moving the children into a public school regular education facility.

502.4(i)(iv) The facility in which the program is located has been inspected for health and safety by appropriate state agencies and the local fire inspector. A copy of the certificates of inspection shall accompany the request for approval of the program.

502.4(j) The child's program shall be conducted for the number of days in the public school year.

502.5 *Day school program.*

Each school committee shall arrange for the provision of programs within the prototype to each child in need of special education only when the nature or severity of the special need is such that education in a less restric-

tive prototype with the use of supplementary aids and services cannot be achieved satisfactorily. Programs within this prototype shall have the following characteristics:

502.5(a) The child shall be placed in a program at a facility other than a public school regular education facility.

502.5(a)(i) The child's program shall be conducted for the number of days in the public school year, unless the Administrator of Special Education states that a program with a longer or shorter duration is in the child's best interests, in accordance with ¶ 322.4(b).

502.5(a)(ii) The child's program shall have a duration of at least five hours each day unless the Administrator of Special Education states that a shorter or longer duration is in the child's best interests.

502.5(a)(iii) The child shall return each night to his or her place of residence.

502.5(a)(iv) The site of the program shall be within one hour traveling time, one-way, from the child's home; provided, however, that where the TEAM deter-

mines that a longer traveling time may be necessary, it shall make a written request for approval of such longer time to the Administrator of Special Education who may approve such request.

502.5(b) Each school committee shall arrange for the provision of all programs within this prototype through the procedures described in ¶ 504.0.

502.6 *Residential school program.*

Each school committee shall arrange for the provision of a program within this prototype to each child in need of special education for whom an IEP specifies such a program based on a finding by the Administrator of Special Education, upon recommendation by the TEAM, that a residential school program is necessary to meet the educational goals and objectives in the IEP. Programs within this prototype shall have the following characteristics:

502.6(a) The child shall be placed in a program at a facility other than a public school regular education facility and shall live in such facility.

502.6(b) The child's program shall have a duration of the number of days in the public school year, unless the Administrator of Special Education states that a program with a longer or shorter duration is in the child's best interests, in accordance with ¶ 322.4(b).

502.6(c) Each school committee shall arrange for the provision of all programs within this prototype through the procedures described in ¶ 504.0.

Regulations, Massachusetts Department of Education, July, 1981
603 Code of Massachusetts Regulations (CMR) 504:

504.2 *Procedures for day school or residential school placements.*

(c) Upon written approval of a day school or residential school placement by the Regional Branch Office of the Division and the Secretary of Educational Affairs, and upon written consent by the child's parent, the school committee shall place the child in the approved program. The school committee shall enter into an agreement or contract with the day or residential school in which the child is placed and in such agreement or contract the school shall agree to comply with all elements of the child's IEP and all applicable provisions of these regulations.

504.4 *Placement assistance and program provisions.*

(a) If the Administrator of Special Education is unable to find an appropriate placement for a child that complies with the elements of the child's IEP, he/she may request assistance from the Division by submitting a letter to the appropriate Regional Branch Office of the Division requesting assistance and listing any schools that have been considered and the reason(s) given by the schools for not accepting the child. The letter shall be accompanied by a copy of the child's IEP, copies of all assessments from the evaluation, and the designation by the Administrator of a placement specialist who will work with the Division.

Regulations, Massachusetts Department of Education, July, 1981 603 Code of Massachusetts Regulations (CMR) Chapter 8 — Private Schools:

803.0 *Application for approval: Further information required.*

Each school seeking approval by the Regional Review Board shall also submit, in writing, the following information:

803.1 A complete behaviorally specific description of the education and treatment services which it prepared to offer to children in need of special education, including a statement of the types of educational goals it is prepared to help such children achieve; the methods it will use to achieve such goals; and the provision for instruction, regular liaison with and involvement of parents in the program of each child.

Regulations, Massachusetts Department of Education, May 1, 1980 "Guidelines for Approval of Day and Residential Educational Components in Private Schools Under Chapter 766".

PART 200—GENERAL ADMINISTRATIVE REQUIREMENTS FOR EDUCATIONAL COMPONENTS

§ 200.01 *Statement of Purpose*

Each school shall keep and maintain a written statement identifying the school's philosophy, its goal and objectives, the characteristics and ages of children served, its intake procedures, termination procedures, and the process for re-entry to the public school, and the services provided. The school shall provide to each public school referring children, and the child's parent, upon request, a copy of this statement, and shall keep such statement current. . . .

PART 201— PERSONNEL POLICIES FOR DAY AND RESIDENTIAL SCHOOLS

§ 201.01 *Personnel Policies*

The school shall have available in writing its current personnel policies and practices. Such personnel policies shall include a description of:

(a) criteria and procedures for hiring and suspension or dismissal of any staff person;
(b) the procedures for handling staff complaints;
(c) provisions for vacations, holidays, leaves, sick days, and any other benefits or requirements maintained by the school.